Filed 1/14/19 P. v. Maravilla CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ISIDRO MUNGIA MARAVILLA,

Defendant and Appellant.

F075178

(Super. Ct. No. F12909484)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Richard A. Levy, under appointment by the Court of Appeal, for for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Following two prior convictions for misdemeanor driving under the influence of alcohol (DUI), appellant Isidro Mungia Maravilla again drove while intoxicated and he crashed. His passenger died, and a jury convicted him of murder (Pen. Code, § 187, subd. (a);[1] count 1), finding true that he personally inflicted great bodily injury upon the decedent (§ 1203.075). Appellant was sentenced to prison for 15 years to life.

Appellant raises numerous issues in the present appeal, including the sufficiency of the evidence, the trial court's denial of a motion to suppress his statements to law enforcement, and other alleged instructional and evidentiary errors. We reject his claims. We agree with the parties, however, that the abstract of judgment must be amended to reflect a conviction of second degree murder. We otherwise affirm.

BACKGROUND

We provide a relevant summary of the trial evidence.

I. The Automobile Accident.

On November 20, 2012, appellant was driving his vehicle at night when it ran off the road. The vehicle sheared through a telephone pole and crossed into a vineyard. It flipped over before coming to a stop. Emergency personnel responded, and appellant was transported to a hospital. His passenger, Chrystian Rodriguez, died from massive blunt force trauma. Rodriguez was pronounced dead at the scene.[2]

Law enforcement determined that appellant's vehicle had been traveling westbound when it crossed the eastbound lane and collided with the telephone pole. It was estimated that the vehicle had been traveling at or around the speed limit of 55 miles

---

1 All future statutory references are to the Penal Code unless otherwise noted.

2 At various times, the reporter's transcript uses "Christian" and "Chrystian" to spell Rodriguez's first name. In addition, the first amended information used "Christyan" to spell his first name. We adopt the spelling that appears on the verdict form.

per hour. There were no tire friction marks or brake marks on the roadway in the area of this accident.

II. Evidence Of Appellant's Intoxication.

It is undisputed that appellant had consumed alcohol in the hours prior to this accident. According to appellant, he had been with Rodriguez at a tool shop. Using separate vehicles, both men drove to the shop, which was near appellant's residence. At trial, appellant admitted that both he and Rodriguez drank alcohol over a five-hour period while at the shop. He said he consumed around four beers and a shot of whiskey during that time.[3] They left in appellant's vehicle to buy food because Rodriguez's truck was low on fuel.

Appellant's blood was drawn at the hospital shortly after this accident and his blood-alcohol content (BAC) registered about 0.21 percent.[4] His BAC may have been as high as 0.25 percent when this accident occurred.

A highway patrol officer told the jury that some empty beer cans were observed inside appellant's overturned vehicle. At the hospital, the officer spoke to appellant, who had an "overpowering odor of an alcoholic beverage coming from his person." When appellant spoke, the odor of alcohol was even stronger. His eyes were red and watery.

---

[3] The evidence also established that appellant had methamphetamine in his system when this crash occurred. The amount of methamphetamine, however, was not considered high. At trial, appellant admitted he had ingested methamphetamine the day before this accident. The highway patrol officer who interviewed appellant at the hospital told the jury that he did not notice any "drug influence" when he spoke with appellant. According to a forensic toxicologist, it was not clear whether appellant was in "an up phase or coming down in the down phase."

[4] At trial, a forensic toxicologist explained that driving is a divided attention task. At a BAC of 0.15 percent, everyone will exhibit signs of alcohol impairment. A defense expert raised concerns regarding the laboratory's procedures used to measure appellant's BAC. However, although the defense expert had concerns about relying on the results, he could not conclude that the results were wrong. During rebuttal, the forensic toxicologist stated the testing performed on appellant's blood met state standards and were accurate.

III. Appellant's Statements To The Officer At The Hospital.

At the hospital on the night of this accident, the officer spoke to appellant while using a Spanish interpreter. After giving *Miranda*[5] warnings, the officer asked appellant about the accident. At various times, appellant claimed he could not remember anything. At other times, he did not respond to questions. According to the officer, appellant appeared uncooperative. He would not make eye contact with the officer. When asked what he had been drinking, appellant answered, "Nothing."[6]

At the hospital, appellant spelled his first name incorrectly for the officer, claiming he was Isidrio Maravilla (as opposed to Isidro). As a result, the officer was unable to locate a matching driver's license for appellant. Upon his booking the next day, authorities confirmed appellant's correct name.

IV. The Evidence Of Prior Warnings Regarding Driving While Intoxicated.

To prove malice, the prosecution established that appellant had DUI convictions in 2008 and 2011. With both convictions, appellant received a written admonition that, if he subsequently drove while under the influence of alcohol and killed someone, he could be charged with murder. At the 2011 change of plea and sentencing hearing, the court verbally admonished appellant that he could be charged with murder if he drove again while intoxicated and someone died.[7] Appellant received the prior verbal admonition about 11 months before this fatal accident occurred.

Following his 2011 conviction, appellant was placed on bench probation for three years. Following both convictions, he took required driving classes. He received

---

5 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

6 The officer also asked appellant if he had been drinking "since" the collision. Appellant looked at the officer and responded "no."

7 The 2011 change of plea was audio-recorded. It was played for the jury during this trial. In addition, a written transcript was provided to the jury.

instruction that a DUI suspect could be charged with murder if the suspect subsequently drove drunk and killed someone.

V. The Disputed Evidence Regarding The Cause Of This Fatal Accident.

An important issue at trial centered on the cause of this accident. The highway patrol did not create an accident reconstruction for this incident. However, the responding officers created both a factual diagram and a sketch of the accident scene. These visual representations suggested an abrupt turn or veering to the left. However, an officer testified that it was possible appellant's vehicle made a more gradual movement to the left when it ran off the road. The officer clarified that his report was not intended to indicate the exact travel pattern of the vehicle. Based on a hypothetical, the officer explained that, if appellant's vehicle had moved to the left at a gentler rate than depicted in the visual representation, and the front left tire had contacted the dirt next to the road, then the vehicle would have rotated to the left. The officer saw evidence that appellant's vehicle left the road and turned in a counter-clockwise motion.

The officer's report listed the cause of this accident as driving under the influence of alcohol and/or drugs. An "associated factor" was an unsafe turning movement. It was unclear, however, why appellant allowed the vehicle to turn to the left.

Appellant testified in his own defense. Despite drinking the beers and whiskey, appellant told the jury that he had felt okay to drive. To explain how this accident occurred, he claimed that, while he was driving, he had argued with Rodriguez, who was in the passenger seat. According to appellant, Rodriguez was mad, and Rodriguez suddenly grabbed the steering wheel, pulling it. After that, appellant did not remember what happened, but "[e]verything happened very quickly." He denied that he did anything purposely to make the vehicle leave the road. On cross-examination, appellant said he tried to control the vehicle after Rodriguez grabbed the steering wheel. He said it was possible he overcorrected. After first saying he used the brakes, he said he did not remember using them.

A retired highway patrol officer, Stephen Cloyd, testified for appellant as an accident reconstruction expert. Based on the highway patrol officers' sketch and factual diagram, Cloyd opined at trial that appellant did not fall asleep while driving. There was no report of a mechanical failure with appellant's vehicle. Instead, the vehicle had made a sharp turn when it went off the road. Based on a hypothetical, Cloyd agreed that, if appellant's passenger suddenly grabbed the steering wheel and pulled it, that could be consistent with how this vehicle crashed. Cloyd opined that alcohol or drugs would have had no effect on appellant's ability to control the vehicle in that situation.

During cross-examination, Cloyd agreed that, if someone had a BAC of 0.21 percent, it would impact their ability, as compared to a sober driver, to respond to someone grabbing the steering wheel. Cloyd agreed that this accident was consistent with appellant overcorrecting. He agreed that, when under the influence of alcohol, a driver's ability is compromised to both turn and brake.

DISCUSSION

I. Substantial Evidence Supports The Murder Conviction.

Appellant argues there was insufficient evidence to establish his implied malice necessary for the murder conviction.

A. Standard of review.

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary finding beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.) The standard of review is the same in which a conviction is

based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625.)

B. Analysis.

Appellant contends the prosecution presented insufficient evidence to establish he was subjectively aware that his actions were dangerous to human life. He concludes that his conviction cannot stand because substantial evidence does not support a finding of implied malice. We disagree. Overwhelming circumstantial evidence established implied malice in support of the murder conviction.

In *People v. Watson* (1981) 30 Cal.3d 290, our Supreme Court held that, in appropriate circumstances, a homicide caused by a drunk driver may be prosecuted as second degree murder based on implied malice if the facts demonstrate a subjective awareness of the created risk. (*Id.* at p. 298.) A conscious disregard for the safety of others may be found when a person consumes alcohol to the point of intoxication, knowing that he or she will drive a motor vehicle capable of great force and speed. (*Id.* at pp. 300–301.)

Appellate courts "have relied upon some or all of the following factors in upholding drunk-driving-murder convictions: (1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Talamantes* (1992) 11 Cal.App.4th 968, 973.) However, appellate courts recognize that there is no formula used to analyze vehicular homicide cases. Instead, a case-by-case approach is employed. (*People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 698 (*Costa*); *People v. Olivas* (1985) 172 Cal.App.3d 984, 989 (*Olivas*).)

In this matter, substantial evidence supports the jury's determination that appellant was subjectively aware that driving under the influence of alcohol was dangerous to human life. In addition, substantial evidence supports the jury's determination that appellant deliberately drove with a conscious disregard for human life. As appellant

concedes in his opening brief, the evidence suggests he drank more than he claimed. The jury was not required to accept his self-serving testimony that he only drank four beers, and had a shot of whiskey, in the five hours before he drove. To the contrary, his BAC was almost three times the presumed legal limit. Empty beer cans were observed inside his crashed vehicle, which suggested he continued to drink even while driving. He had two prior DUI convictions. He was on probation when this fatal accident occurred, and his previous conviction was less than a year old.

With his two prior convictions, appellant received a written admonition that, if he subsequently drove while under the influence of alcohol and killed someone, he could be charged with murder. In addition, at the 2011 change of plea and sentencing hearing, the court verbally admonished appellant that he could be charged with murder if he drove again while intoxicated and someone died. Following both convictions, appellant took required classes which instructed that a DUI suspect could be charged with murder if the suspect subsequently drove drunk and killed someone. Appellant concedes that, during his court-ordered classes, "he was taught that he risked a murder conviction if he killed someone while driving drunk."

Appellant argues, however, that, just because he sat through the mandatory classes, nothing establishes his knowledge of the hazards of driving while intoxicated. Likewise, he asserts that, as an experienced drinker, his relatively high BAC did not establish that he subjectively appreciated the danger. We reject these contentions. The jury was entitled to draw a reasonable inference that appellant did gain a subjective awareness of the dangers of DUI driving by attending the educational programs. (*People v. Murray* (1990) 225 Cal.App.3d 734, 746.

Appellant contends that, unlike in certain published opinions, he never made statements suggesting he had subjective knowledge. This is immaterial. Like all elements of a crime, implied malice may be proven by circumstantial evidence and direct evidence of a defendant's mental state is not necessary. (*Costa, supra,* 183 Cal.App.4th

at p. 697.) Driving under the influence of alcohol is inherently dangerous and someone who has been convicted of that offense knows that such conduct involves a substantial risk of harm to others. (*People v. Brogna* (1988) 202 Cal.App.3d 700, 709.) Convictions for DUI, even without the accompanying educational programs, are sufficient for a jury to reasonably infer that a defendant has knowledge regarding the dangers of drunk driving. (*People v. Autry* (1995) 37 Cal.App.4th 351, 359.) In addition, attendance at educational programs highlighting the hazards of driving while intoxicated have been deemed substantial evidence to establish implied malice. (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 683 [defendant attended a victim impact panel, which had reviewed the consequences of drinking and driving]; *People v. Murray, supra,* 225 Cal.App.3d at p. 746 [a jury can infer defendant's knowledge from exposure to DUI educational programs].)

Based on appellant's high BAC percentage, his prior DUI convictions, his probationary status, and his attendance at educational programs highlighting the hazards of driving while intoxicated, substantial evidence supports the jury's finding of implied malice. (*People v. Wolfe, supra,* 20 Cal.App.5th at p. 683; *People v. Murray, supra,* 225 Cal.App.3d at p. 746.) In fact, the circumstantial evidence is overwhelming.

Appellant claims there was little evidence that he "soberly formed the intent to drink and then to drive." However, appellant and Rodriguez separately drove to a tool shop where they worked and drank together. They left in appellant's vehicle to buy food because Rodriguez's truck did not have a lot of fuel. A reasonable inference exists that, when appellant began to drink, he intended to drive again. (*People v. Wolfe, supra,* 20 Cal.App.5th at p. 683.) We must presume every inference in support of the judgment that the jury could reasonably have made, and we will not reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy, supra,* 48 Cal.4th at p. 293.)

Finally, we reject appellant's assertion that he exhibited no evidence of "highly dangerous" driving.[8] This crash occurred when appellant turned his vehicle sharply, crossed over the oncoming lane of traffic, sheared through a telephone pole and flipped into a vineyard. Although appellant was not driving with excessive speed, nothing indicates he tried to brake before this accident occurred. The jury found true that appellant inflicted great bodily injury on Rodriguez. Based on the verdict of guilt rendered, and the true finding on the special allegation of great bodily injury, it is apparent that the jury rejected appellant's claim that Rodriguez was the substantial factor in causing this accident. A jury could have reasonably concluded that appellant's inability to keep his vehicle on the road did "qualify as 'highly dangerous' driving," particularly considering Rodriguez's death and the violent nature of this accident. (*People v. Wolfe, supra,* 20 Cal.App.5th at p. 684.)

Based on this record, a reasonable jury could have determined beyond a reasonable doubt that appellant had the required implied malice when he drove his vehicle and crashed it, killing Rodriguez. The totality of the circumstantial evidence overwhelmingly demonstrated appellant's subjective knowledge that his actions were dangerous to human life. This evidence was reasonable, credible and of solid value. As such, substantial evidence supports the murder conviction and this claim fails.

II. Appellant Has Forfeited A Claim That Instructional Error Occurred With CALCRIM No. 2110 And This Claim Fails On Its Merits.

Appellant asserts that the trial court committed prejudicial instructional error when it used CALCRIM No. 2110. This instruction, in part, defines when a person is "under

---

[8] Appellant claims that evidence of highly dangerous driving is limited to driving *prior to* the incident causing the fatal collision. He cites no authority for that proposition and we disagree with his assertion. At least one appellate court has determined that evidence of highly dangerous driving existed when an inebriated driver was unable to keep her vehicle in its lane, which caused her to strike and kill a pedestrian on the side of the road. (*People v. Wolfe, supra,* 20 Cal.App.5th at p. 684.)

the influence" of alcohol and/or drugs. The jury was told that, to find appellant guilty of second degree murder, the People must prove that appellant drove a vehicle while under the influence of an alcoholic beverage and/or a drug. The court advised the jurors that, if the prosecution proved beyond a reasonable doubt that appellant's BAC was 0.08 percent or more, they could, but were not required to conclude, that appellant was under the influence of alcohol at the time of this offense. The court concluded the instruction with the following language, which appellant contends was error.

> "If [appellant] was under the influence of an alcoholic beverage and or a drug, then it is not a defense that something else also impaired his ability to drive."

Appellant argues the last portion of this instruction eliminated his defense that Rodriguez was the substantial factor in causing this accident.

A. Standard of review.

Instructional errors are questions of law, which we review de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We view the challenged instruction in the context of the entire trial record to determine whether a reasonable likelihood exists that the jury applied the instruction in an impermissible manner. (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) We must determine if it is reasonably likely the jurors understood the disputed instruction as appellant suggests. In making that determination, we consider the language of the instruction, the trial record, and the arguments of counsel. (*People v. Nem* (2003) 114 Cal.App.4th 160, 165.)

B. Analysis.

Appellant asserts that the last paragraph of CALCRIM No. 2110 precluded the jurors from considering his defense that Rodriguez was the substantial factor in causing

this crash.[9] We disagree. As an initial matter, appellant has forfeited this claim. In any event, it also fails on its merits.

1. Appellant has forfeited this claim.

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Failure to object to such an instruction, or seek modification, precludes the defendant from raising the claim on appeal. (*Ibid.*)

Here, appellant failed to object to the use of CALCRIM No. 2110 or seek modification of its language. As such, he has forfeited this claim on appeal. In any event, this claim also fails on its merits.

2. Instructional error did not occur.

CALCRIM No. 2110 dealt with inebriation. It defined what it meant for a person to be "under the influence" of alcohol and/or drugs. This instruction used the term "impaired" when speaking about the possible impact of these substances on a driver. Based on the plain language of this instruction, it is not reasonably likely the jurors may have believed this instruction precluded them from considering whether Rodriguez was a substantial factor in causing this accident.

Further, the closing arguments forestall any claim that the jurors may have misunderstood this instruction. The prosecutor never suggested that appellant was precluded from claiming that Rodriguez was the substantial factor in causing this crash. To the contrary, the prosecutor discussed the "substantial factor" that may have caused

---

[9] In raising this claim, appellant comments that the jury sent a note to the trial court asking if the court intended to include this instruction, which did not have the judge's initials and date. The judge responded that the failure to initial and date this instruction was an oversight. Appellant argues that this exchange indicates the jurors studied this instruction while deliberating.

this accident. She noted that two theories had been presented: (1) either appellant lost control of the vehicle because his BAC was 0.21 percent or (2) Rodriguez interfered with appellant's driving by pulling the steering wheel.

The prosecutor generally contended that appellant lacked credibility. She noted that, when speaking with the officer at the hospital, appellant never claimed that Rodriguez had grabbed the steering wheel. She asserted that, even if Rodriguez had failed to use reasonable care and pulled the steering wheel, appellant's intoxication was still a substantial factor in causing this crash because it prevented him from maintaining control of the vehicle. She argued that a sober driver would have used the brakes to slow or stop the vehicle. She asked the jury to disbelieve appellant's testimony. However, according to the prosecutor, even if Rodriguez had pulled the steering wheel, appellant was still responsible for this crash and a substantial factor in causing Rodriguez's death.

Finally, based on the totality of the instructions, it is apparent that the court advised the jurors that they could consider appellant's defense. With CALCRIM Nos. 240 and 520, the jury was instructed that there may be more than one cause of death, and a substantial factor does not have to be the only factor that caused the death. With CALCRIM No. 620, the jury was told that Rodriguez's failure "to use reasonable care may have contributed to the death, but if [appellant's] act was a substantial factor causing the death, then [appellant] is legally responsible for the death even though [Rodriguez] may have failed to use reasonable care. If you have a reasonable doubt whether [appellant's] act caused the death, you must find him not guilty." We presume the jurors are "intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

It is not reasonably likely that the jurors understood CALCRIM No. 2110 in the manner appellant now claims. Nothing suggests we should disregard the presumption that the jurors were able to understand the court's instructions. The totality of the instructions and the prosecutor's arguments make clear that the jury could consider

appellant's defense. Based on this record, it is not reasonably likely the jury applied the instruction in an impermissible manner.[10] (See *People v. Houston, supra,* 54 Cal.4th at p. 1229.) Accordingly, even if this claim is not forfeited, instructional error did not occur, and this claim fails.

III. Appellant Has Forfeited His Claim That He Received Inadequate *Miranda* Advisements; He Does Not Establish Ineffective Assistance Of Counsel; And The Trial Court Did Not Err In Impliedly Finding That The Spanish Translation Was Reliable.

On the night of this fatal accident, a highway patrol officer interviewed appellant at the hospital using a Spanish interpreter. Appellant argues the trial court prejudicially erred in permitting admission of his statements at trial.

A. Background.

Prior to trial, the parties conducted a hearing pursuant to Evidence Code section 402. The highway patrol officer testified regarding his interview with appellant at the hospital. We summarize the officer's testimony from this hearing.

1. The officer's testimony from the hearing.

Shortly after this accident, the officer contacted appellant in the hospital. The officer learned that appellant spoke Spanish so he asked the medical staff for an interpreter. A few minutes later, a Spanish interpreter appeared. According to the officer, he advised appellant of his *Miranda* rights by reading it from his arrest report. He read it in English and the translator repeated it in Spanish. The officer specifically testified that he told appellant that he had the right to remain silent. The officer,

---

10 In his reply brief, appellant argues that the "reasonable likelihood" test is inapplicable in this situation because the instructions created a conflict or otherwise did not correctly state the law. (See *People v. Ngo* (2014) 225 Cal.App.4th 126, 151–152 [summarizing opinions in which the reasonable likelihood standard is used for ambiguous jury instructions but not for facially erroneous instructions].) We reject this argument. CALCRIM No. 2110 was not facially erroneous, it did not conflict with other instructions, and it did not prevent consideration of appellant's defense.

however, was not asked, and he did not explain, whether he went through each of the other individual *Miranda* advisements. The officer speaks a little Spanish and he testified that the interpreter's translation "sounded very similar to what I was advising." While admonishing appellant, the interpreter read the *Miranda* warnings from the officer's report. The officer asked appellant if he understood "each of these rights I have explained to you." Through the translator, appellant answered yes.[11] The officer asked appellant if he wanted to talk, and appellant answered yes. Appellant asked the officer what topic they would discuss. The officer began to ask questions about the accident.

2. The parties' arguments and the trial court's ruling.

Following the officer's testimony, appellant's defense counsel argued that nothing established sufficient foundation to qualify the Spanish interpreter for purposes of relaying the *Miranda* warnings. The defense argued that the interpreter's qualifications and language skills "have to be established in some format." The interpreter did not testify at the hearing and, according to the defense, without her testimony, that foundation was lacking.

Following argument by both counsel, the trial court determined that the officer had asked the hospital for a translator, and she was provided. This was not a situation where "the first person available" or a "family member" had been used. The interpreter read the warnings. The officer, with his limited knowledge of Spanish, recognized some similarity of the interpreter's words. The court ruled that the Spanish interpreter had acted as a conduit for the officer's translation. The court found that appellant provided an affirmative response to his rights and a valid waiver.

---

11 The Spanish interpreter did not testify at this hearing, but she did testify at trial. She told the jury she is a native Spanish speaker who works at the hospital as a unit clerk. She "sometimes" assists in Spanish interpretation as needed. Based on the large number of interpretations that she does daily, she did not remember her involvement in this matter.

The court acknowledged that, other than the right to remain silent, the officer did not testify about each individual *Miranda* warning. However, the court noted that the officer relied on the warnings that appeared on his arrest report, which was available to both attorneys during the hearing. The court further noted that the officer used his report to refresh his recollection. The court was satisfied that the interpretation provided at the hospital was to aid the officer, and appellant never indicated he did not understand. The court ruled that appellant's statements to the officer would be admissible.

B. Standard of review.

We use an independent or de novo standard of review when a trial court grants or denies a motion to suppress a statement under *Miranda*. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

C. Analysis.

Appellant raises two issues in challenging the admissibility of his statements. First, he claims he did not receive full *Miranda* warnings. Second, he argues there was "an insufficient showing" that the Spanish interpreter correctly translated all four *Miranda* warnings.

As an initial matter, we need not address appellant's claim regarding the adequacy of the *Miranda* advisements. While a dispute may exist whether appellant received full *Miranda* warnings, we agree with respondent that appellant has forfeited this issue because it was not raised below. We reject appellant's assertion that the forfeiture resulted from ineffective assistance of counsel. Finally, we determine that substantial evidence supports the trial court's implied findings that the interpreter was qualified and that the translations were reliable. The court did not err in making those implied findings.

1. Appellant has forfeited his claim that he did not receive full and adequate *Miranda* warnings.

In general, a timely objection or motion is required before a verdict, finding or judgment will be reversed due to the erroneous admission of evidence. (Evid. Code, § 353, subd. (a).) Our Supreme Court has held that a failure to object in the trial court results in a forfeiture of those issues for appeal. (*People v. Dykes* (2009) 46 Cal.4th 731, 756; see also *People v. Redd* (2010) 48 Cal.4th 691, 730 [failure to raise confrontation clause in the trial court forfeited the claim on appeal].)

To preserve a *Miranda* claim, a defendant must make a timely objection in the trial court on the precise ground that is raised on appeal. (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 (*Polk*).) Failure to do so results in forfeiture of the claim even if the defendant asserted other arguments under *Miranda*. (*Ibid.*) For example, a defendant cannot challenge the substantive adequacy of *Miranda* warnings on appeal if that was not raised below, even if other arguments, such as coercion, were made. (*Polk*, *supra*, at p. 1193.) Even if a trial court sua sponte rules on the sufficiency of *Miranda* advisements, that issue is not preserved for appeal if the defendant failed to raise it below. (*Polk*, *supra*, at pp. 1194–1195 & fn. 9.) A trial court's "pronouncement" regarding the adequacy of *Miranda* warnings does not relieve a defendant of the obligation to raise the specific grounds for objection. (*Id.* at p. 1195, fn. 9.)

Appellant argues that, because the prosecutor elicited some testimony about it, and because the trial court addressed it in its ruling, the sufficiency of the *Miranda* advisements was preserved for appeal. He further contends that *Polk* is no longer "good authority" based on two Supreme Court opinions: (1) *People v. Brooks* (2017) 3 Cal.5th 1 (*Brooks*) and (2) *People v. Valdez* (2012) 55 Cal.4th 82 (*Valdez*). He maintains that an error is preserved for appeal if the lower court resolves it sua sponte or after the People raise it. We reject these contentions.

The Supreme Court has long held that, if a trial court overrules an objection, "the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 5.)

Neither *Brooks* and *Valdez* assist appellant. These opinions confirm that a defendant must do more than make a general objection to preclude the introduction of evidence. According to *Brooks*, an objection must provide the specific reasons why the evidence should be excluded so the trial court can make a fully informed ruling. (*Brooks, supra,* 3 Cal.5th at p. 42.) According to *Valdez*, a defendant must " 'press for a ruling on a motion to exclude evidence' " to avoid forfeiture of those claims on appeal because " 'such failure deprives the trial court of the opportunity to correct potential error in the first instance. [Citation.]' " (*Valdez, supra*, 55 Cal.4th at p. 143.) Neither *Brooks* nor *Valdez* have overturned *Polk*. These authorities do not mandate reversal in this situation.

Appellant never challenged the alleged inadequacy of the *Miranda* advisements. Instead, his argument focused on the interpreter's failure to testify at the hearing. He asserted that her qualifications were not established. Because appellant failed to raise the sufficiency of the substantive *Miranda* admonishments, he has forfeited that claim on appeal.[12] (*Polk, supra,* 190 Cal.App.4th at p. 1194.) Indeed, it is unfair to the trial court to raise an alleged error that could have been easily corrected below. Appellant did not "provide the trial court an opportunity to avoid error on that ground." (*Polk*, *supra*, 190

---

12 In dicta, at least one appellate court has noted that an officer's "conclusionary answer" regarding what *Miranda* rights were given to a suspect may be sufficient "if defense counsel makes no objection and does not seek to bring out the exact language used. [Citation.]" (*People v. Barbosa* (1967) 254 Cal.App.2d 581, 584, fn. 3.)

Cal.App.4th at pp. 1194–1195.) Thus, we will not consider appellant's claim that his substantive *Miranda* advisements were deficient.

2. Appellant does not establish ineffective assistance of counsel.

To overcome forfeiture of this issue, appellant asserts that his trial counsel rendered ineffective assistance. We disagree.

Under the federal and state Constitutions, a criminal defendant is entitled to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a defendant must establish two criteria: (1) that counsel's performance fell below an objective standard of reasonable competence and (2) that he was thereby prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The defendant has the burden of showing both deficient performance and resulting prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) An appellate court will reverse the conviction "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

This record demonstrates that appellant's trial counsel was not neglectful, but, rather, made a tactical decision that we will not second guess on appeal. During the preliminary hearing, the highway patrol officer testified about his interview with appellant at the hospital. According to the officer, the interpreter at the hospital said she was certified to interpret.[13] At the preliminary hearing, the officer was asked, and he described, advising appellant (1) of his right to remain silent; (2) that anything he said could and would be used against him in court; (3) of his right to an attorney before and during questioning; and (4) that an attorney would be appointed to him at no cost if he could not afford one. The officer asked appellant if he understood those rights. Appellant said yes, and he asked the officer what he wanted to know. The interview

---

13 An objection based on hearsay was overruled.

commenced. The officer said he never saw anything that indicated appellant's lack of understanding.

Following the preliminary hearing, a reasonable defense attorney would have realized it was futile to attempt to suppress appellant's statements to the officer based on an alleged deficiency in the *Miranda* advisements. Instead, appellant's trial counsel focused on the translator's failure to testify. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)

This record does not affirmatively disclose that appellant's defense counsel had no rational tactical purpose for his alleged omissions. As such, appellant has not met his burden of showing deficient performance. (*People v. Lucas, supra,* 12 Cal.4th at p. 436.) Thus, appellant has not established ineffective assistance of counsel. (*Strickland v. Washington, supra,* 466 U.S. at p. 687.)

3. Substantial Evidence Supports The Trial Court's Implied Findings Regarding The Reliability Of The Translation And The Court Did Not Err In This Regard.

When reviewing a trial court's denial of a suppression motion, we accept the trial court's resolution of disputed facts, and its credibility evaluations, if substantial evidence supports them. (*People v. Jackson* (2016) 1 Cal.5th 269, 339.)

During the Evidence Code section 402 hearing, appellant challenged the translator's qualifications and cited *Correa v. Superior Court* (2002) 27 Cal.4th 444 (*Correa*) and *United States v. Nazemian* (9th Cir. 1991) 948 F.2d 522 (*Nazemian*). After reviewing these authorities, and hearing argument from counsel, the trial court ruled that appellant's statements to the officer would be admissible. In rejecting appellant's arguments, the court never expressly found that the interpreter was qualified. The court also never expressly found that the interpretations provided were reliable. Based on its ruling, however, it is clear the court impliedly made those findings. We determine that

substantial evidence supports the trial court's implied findings and we conclude that the court did not err.

Appellant's cited authorities do not assist him. In *Correa*, our Supreme Court analyzed the foundational requirements for the admission of translated statements. Police officers had used bystanders to act as Spanish interpreters when interviewing a crime victim and a witness. (*Correa, supra,* 27 Cal.4th at p. 448.) At the defendant's subsequent preliminary hearing, the defendant argued that, because of the bystanders, the officers' testimony constituted inadmissible multiple hearsay. (*Ibid.*) The high court rejected that argument. (*Ibid.*)

According to *Correa*, an unbiased and adequately skilled translator may serve "as a 'language conduit,' " so that the translated statements are deemed from the original declarant. (*Correa, supra,* 27 Cal.4th at p. 448.) To be admissible for purposes of hearsay, the translation must appear reliable and the interpreter unbiased. (*Id.* at p. 453.) *Correa* determined that the officers' testimony met the requirements of admissibility at the preliminary hearing under the provisions of Proposition 115.[14] (*Correa, supra,* at p. 453.) According to the high court, "[t]he language-conduit theory calls for a case-by-case determination whether, under the particular circumstances of the case, the translated

---

[14] "Proposition 115 constituted an amendment to the California Constitution: '[T]he measure permitted the admission of hearsay at preliminary examinations and thus amounted to a state constitutional exception to the right to confrontation enunciated in the state Constitution.' [Citation.]" (*Correa, supra,* 27 Cal.4th at p. 464.) After the passage of Proposition 115, a preliminary hearing now serves a limited function. Defendants may no longer use it "for discovery purposes and trial preparation, it serves merely to determine whether probable cause exists to believe that the defendant has committed a felony and should be held for trial. [Citation.]" (*Correa, supra,* 27 Cal.4th at p. 452.) The intent of Proposition 115 was to relieve crime victims and witnesses of the obligation of testifying at a preliminary hearing. (*Correa, supra,* at p. 452.) Under Proposition 115, a police officer may testify at a preliminary hearing and relay out-of-court statements if the officer has sufficient knowledge of the crime or circumstances under which the out-of-court statement was made to meaningfully assist the magistrate in assessing the reliability of the statement. (*Correa, supra,* at p. 452.)

statement fairly may be considered to be that of the original speaker." (*Id.* at p. 457.) In reviewing various opinions dealing with this subject, *Correa* recognized that the person who provided the translation did not always testify. (*Id.* at p. 459.) *Correa* agreed, however, that if facts cast " 'significant doubt upon the accuracy' " of the translation, either the translator or a witness who heard and understood the untranslated statements " 'must be available for testimony and cross-examination' " before the statements can be admitted. (*Ibid.*)

The *Correa* court approved of the "measured approach" used by the Ninth Circuit Court of Appeals in *Nazemian, supra,* 948 F.2d 522. (*Correa, supra,* 27 Cal.4th at p. 457.) *Nazemian* held that there are " 'a number of factors which may be relevant in determining whether the interpreter's statements should be attributed to the [declarant] . . . , such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.' " (*Correa, supra,* at p. 458, quoting *Nazemian, supra,* at p. 527.)

In this case, the evidence supports the trial court's implied findings regarding the reliability of these translations and the translator's qualifications. The translator responded shortly after the officer asked the medical staff for an interpreter. The evidence overwhelmingly suggests that the interpreter worked at the hospital and she was qualified to assist in Spanish language translations. Nothing suggests that the translator knew appellant or was otherwise involved in the criminal investigation. The evidence establishes that the translator was unbiased and bilingual.

Further, the officer was able to explain how the translations were made, which aided in evaluating reliability. (*Correa, supra,* 27 Cal.4th at p. 453.) The officer read appellant's *Miranda* rights from his arrest report. He read it in English and the translator read it in Spanish. The officer would point to words on the report for the interpreter to read. The officer told appellant that he had the right to remain silent. The officer speaks

a little Spanish and the interpreter's translation "sounded very similar to what I was advising." The officer asked appellant if he understood "each of these rights I have explained to you." Through the translator, appellant answered yes. The officer asked appellant if he wanted to talk, and appellant answered yes. Nothing established or suggested that the Spanish interpreter was unable to relay the officer's statements. At no time did appellant express confusion. There is nothing in the record to suggest that the translation was inaccurate. (*Nazemian*, *supra*, 948 F.2d at p. 528 [noting absence of evidence that translation was inaccurate].)

Although the Supreme Court in *Correa* found it significant that the translators testified at the preliminary hearing, its opinion did not suggest that the translators' testimony was required to find admissibility. Instead, the high court focused on reliability and bias. (*Correa, supra*, 27 Cal.4th at p. 453.) Moreover, *Correa* recognized that the translator does not always need to testify to establish admissibility. (*Id.* at p. 459.) Additional testimony is needed only if the facts cast " 'significant doubt upon the accuracy' " of the translation. (*Ibid.*)

Based on this record, substantial evidence supports the trial court's implied findings that the Spanish translator was qualified, and that she provided reliable translations. Nothing established or suggested her bias or interest in the criminal investigation. The facts did not cast significant doubt upon the accuracy of the translation. The court correctly ruled that the Spanish interpreter acted as a language conduit for the officer. As such, the court properly rejected appellant's arguments regarding an alleged lack of foundation establishing the translator's qualifications. (*Correa, supra*, 27 Cal.4th at p. 448.) Accordingly, the trial court did not err, and this claim fails.

IV. We Need Not Resolve Whether The Trial Court Erred In Excluding Testimony About Rodriguez's Failure To Alert Appellant That He Was Too Impaired To Drive Because Any Alleged Error Is Harmless.

On direct examination at trial, appellant was asked whether the victim, Rodriguez, had told him that he was unsafe to drive. Based on hearsay, the prosecutor objected. The trial court sustained the objection. Appellant now claims that the trial court committed prejudicial error in precluding this testimony. He argues this evidence would have corroborated his subjective belief that he was not too impaired to drive. He contends this ruling violated his right to present a defense under the federal Constitution.

The parties dispute numerous issues involved in this claim. They disagree on (1) whether this testimony was offered for its truth or, rather, to show its effect on appellant; (2) whether this issue was preserved for appeal; (3) whether appellant's counsel rendered ineffective assistance if this issue is deemed forfeited; (4) whether the trial court abused its discretion; and (5) whether any error was prejudicial.

To resolve this claim, we need not address each of the parties' arguments. While there may be a dispute whether the testimony constituted hearsay or not, we agree with respondent that any presumed error is harmless. As such, we proceed directly to the issue of prejudice.

Appellant contends that the trial court's ruling was a violation of his federal constitutional rights because it prevented him from presenting a defense. We disagree. A trial court's ruling precluding certain defense evidence is not the same as the denial of a defense. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) However, based on this record, even if federal error occurred, we can declare that the alleged error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

Overwhelming evidence established implied malice. At trial, appellant admitted consuming alcoholic beverages prior to driving. The record disputes appellant's self-serving testimony that he only drank four beers, and had a shot of whiskey, in the five

hours before he drove. To the contrary, he drove with a BAC almost three times the presumed legal limit. After this crash occurred, empty beer cans were observed inside his overturned vehicle. This strongly suggests appellant continued to drink while driving.

At the hospital, appellant had an "overpowering odor of an alcoholic beverage coming from his person." When appellant spoke, the odor of alcohol was even stronger. His eyes were red and watery. When asked what he had been drinking, appellant answered, "Nothing." Appellant appeared uncooperative during his interview with the officer, and he provided an incorrect spelling of his first name. At times, appellant claimed a failure to remember anything. As the prosecutor noted during closing arguments, appellant's behavior with the officer at the hospital suggested his attempt to hide information. Moreover, when given an opportunity, appellant failed to tell the officer that Rodriguez had caused the accident by pulling the steering wheel.

Appellant had two prior DUI convictions. He was on probation when this fatal accident occurred, and his previous conviction was less than a year old. With his prior convictions, appellant was repeatedly warned, both in writing and once verbally from the sentencing court, that he could be charged with murder if he subsequently drove while under the influence of alcohol and killed someone. Following both convictions, appellant took required driving classes. As appellant concedes in his opening brief, he was taught during his court-ordered classes that he risked a murder conviction if he killed someone while driving drunk.

Prior to driving while under the influence, appellant met Rodriguez at a shop where they worked and drank. They left in appellant's vehicle to buy food because Rodriguez's truck did not have a lot of fuel. The circumstantial evidence strongly suggests that when appellant began to drink he intended to drive again. The jury found true the special allegation that appellant personally inflicted great bodily injury upon Rodriguez.

Based on appellant's high BAC percentage, his prior DUI convictions, his probationary status, and his attendance at educational programs highlighting the hazards of driving while intoxicated, the circumstantial evidence overwhelmingly demonstrates appellant's subjective awareness that driving under the influence of alcohol was dangerous to human life. The evidence overwhelmingly establishes that appellant again decided to drink and drive. We disagree with appellant's contention that this was a close case. It is beyond a reasonable doubt that the alleged error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) The guilty verdict rendered in this trial was surely unattributable to this purported error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Accordingly, any presumed error was not prejudicial, and this claim fails.

V. We Need Not Resolve Whether The Trial Court Erred In Allowing A Chemist To Testify Regarding The Pharmacological Effect Of Alcohol On Behavior Because Any Alleged Error Is Harmless.

Appellant argues that the trial court prejudicially erred in allowing a chemist to testify for the prosecution regarding the pharmacological effect of alcohol on behavior. He contends this testimony occurred without an adequate foundation of expertise on behavioral science.

A. Background.

During the prosecution's case-in-chief, Alan Barbour testified. He holds a doctorate in chemistry. At the time of his trial testimony, Barbour was an associate laboratory director and forensic alcohol supervisor for a local toxicology laboratory. He had about 40 years of experience doing forensic alcohol testing. It was his lab that analyzed appellant's blood that was drawn at the hospital.

Barbour explained to the jury about correlation studies, explaining that a mathematical relationship exists between blood-alcohol levels and automobile accident rates. He opined that, at a BAC of 0.15 percent, everyone is unable to drive safely. He believed that, at that level, everyone is not only too impaired from alcohol to drive, but

"under the influence" within the meaning of the Vehicle Code. He explained that driving an automobile is a divided attention task. He told the jury that, with a BAC above 0.15 percent, all people generally have trouble keeping a vehicle in their lane, braking or accelerating. They may become extremely sleepy. They are less likely to respond to unexpected things.

Barbour reviewed appellant's blood sample taken in this case. It had a BAC of 0.21 percent, with a plus or minus of 0.01 percent. Barbour explained that this amount made it unsafe for appellant to drive.

Following the presentation of defense evidence, the prosecution recalled Barbour during its rebuttal case. It is the following testimony which is the subject of appellant's present claim:

> "[THE PROSECUTOR]: If, hypothetically, someone was driving with a .21 blood alcohol level, would you expect that to interfere with their ability to respond to an emergency?
>
> "[BARBOUR]: Oh, yes.
>
> "[THE PROSECUTOR]: And would their ability to respond to some emergency be substantially worse than that of a sober person?
>
> "[BARBOUR]: Yes.
>
> "[DEFENSE COUNSEL]: Objection, foundation.
>
> "THE COURT: The answer has already been given. The objection was after the answer. It's overruled."

B. Analysis.

The parties disagree whether the trial court abused its discretion in permitting this last exchange of testimony. They also dispute whether forfeiture occurred and whether Barbour was qualified to give this opinion. Finally, they argue whether this ruling was prejudicial.

We need not resolve most of these disputed issues. Instead, we agree with respondent that we can dispose of this claim due to a lack of prejudice. Prior to this disputed testimony, Barbour explained that appellant could not safely operate his vehicle with a BAC of 0.21 percent. He said that anyone with a BAC above 0.15 percent would generally have trouble keeping a vehicle in their lane, braking or accelerating. They may become extremely sleepy. They are less likely to respond to unexpected things.

In addition to Barbour's earlier testimony, other evidence suggested that, if appellant was driving with a BAC of 0.21 percent, that would interfere with his ability to respond to an emergency as compared to a sober driver. Appellant's own accident reconstruction expert, Cloyd, agreed on cross-examination that, if someone had a BAC of 0.21 percent, it would impact their ability, as compared to a sober driver, to respond to someone grabbing the steering wheel. He agreed that, when under the influence of alcohol, a driver's ability is compromised to both turn and brake.

Based on this record, overwhelming evidence established that appellant was impaired and under the influence of alcohol. The evidence overwhelmingly established that appellant was unable to drive safely, and he would not respond well to unexpected events. Although this alleged error did involve the deprivation of federal constitutional rights, we can declare it harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) The guilty verdict rendered in this trial was surely unattributable to this purported error. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Accordingly, even if the trial court erred, prejudice did not occur, and this claim fails.

VI. The Trial Court Did Not Abuse Its Discretion In Precluding Defense Counsel From Discussing Uncharged Crimes During Closing Argument And Any Presumed Error Is Harmless.

In addition to murder (§ 187, subd. (a); count 1), the prosecution initially charged appellant with misdemeanor driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a); count 2); and misdemeanor driving with a BAC of 0.08 percent or

higher (Veh. Code, § 23152, subd. (b); count 3). In the first amended information, however, the People only alleged one count, murder. Murder was the only charge presented to the jury.

During closing arguments, appellant's trial counsel began to discuss how the prosecution had charged this case. The trial court sustained an objection to this argument. Appellant contends that the court prejudicially erred in limiting his closing argument.

A. Background.

Prior to closing arguments, the defense requested a jury instruction under CALCRIM No. 590 regarding gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)). The trial court denied that request because gross vehicular manslaughter while intoxicated is a lesser-related, and not a necessarily lesser included, charge to murder.[15]

Towards the conclusion of his closing arguments, appellant's trial counsel noted a "troubling" circumstance in this case because "the charging document" only alleged murder. Defense counsel noted that murder has elements, such as malice and causation, that must be established beyond a reasonable doubt. Defense counsel stated that "the agency that charges these cases, files the charges, has the responsibility to charge as they see fit. And what is troubling here in this case . . . ." The prosecutor interrupted defense counsel and asked for a sidebar.

Following the unreported sidebar, defense counsel finished his arguments to the jury, emphasizing that the prosecution had not met its burden of proof. During a recess, the trial court and the parties made a record regarding the unreported sidebar.

---

15 "Gross vehicular manslaughter while intoxicated requires proof of elements that need not be proved when the charge is murder, namely, use of a vehicle and intoxication. Specifically, [Penal Code] section 191.5 requires proof that the homicide was committed 'in the driving of a vehicle' and that the driving was in violation of specified Vehicle Code provisions prohibiting driving while intoxicated." (*People v. Sanchez* (2001) 24 Cal.4th 983, 989.)

According to the prosecutor, she objected to the defense attorney's comments to avoid a mistrial because he had begun to discuss the People's charging discretion. Defense counsel made the following comments:

> "[DEFENSE COUNSEL]: Yes. Thank you, Your Honor. I respect the Court's ruling, but let me tell you my thinking in short. I believe in this type of case just like this, that—that a lawyer would be criticized by not pointing out what is essentially a subtle element of unfairness in the context of how this case has been plead and so forth. Really, what I was going to go into was that—and actually, this is what I was going to go into. That this unfortunately created for the jury an all or nothing situation which is potentially very difficult and—but the reason I thought I could be able to do that is that I would address the circumstance what would—what are you going to be able to do—I don't know what you the jury is going to do, but what would you be able to do if you hypothetically found that he was under the influence and found that the driving is—driving was the cause, but you didn't believe that they proved malice. And then, I would have said to them that's the problem. You could find these things, but there's no remedy for it. Or what if you found that he didn't cause the death, he didn't harbor malice, but he was driving under the influence. What could you do then. Because the way it's charged you can't do anything, and that therein lies the basis for the unfairness. The perplexing problem of having to make such an important decision whereby you would know that [appellant] would be freed, which would—might prejudice him in your mind because you thought that he had caused the death, but he didn't have malice. It was that type of argument that I was going to make. And I think that that's legitimate from the evidence because they could find that, and yet they're unable to find that with an appropriate remedy. That's it. That's the offer of proof."

The trial court stated that defense counsel had been "about to go into other types of charges, vehicular manslaughter, gross negligent manslaughter with intoxication involved. And that's the only items that I cautioned you from not saying to the jurors. I never once told you in our side bar that you are not to say to the jurors that the People must be held to every single element beyond a reasonable doubt, and what their choice would be if they're unable to prove one of the various elements. Other than not guilty, they have no other option. So that's all I have to say on that."

B. Standard of review.

"Trial courts have broad discretion to control the duration and scope of closing arguments. [Citation.] [¶] We review a trial court's decision to limit defense counsel closing argument for abuse of discretion. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 147.) Under this standard, we will not disturb the trial court's decision on appeal unless "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; see *People v. Williams* (1998) 17 Cal.4th 148, 162 [abuse of discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].)

C. Analysis.

Appellant contends he should have been permitted to comment to the jury about the lesser related charges which the prosecution elected not to pursue. He asserts his trial counsel was only trying to remind jurors about "common knowledge" DUI charges. He argues he needed to caution the jurors about avoiding a temptation of finding guilt on the murder charge just to prevent appellant from avoiding any liability. He maintains the jury faced an "all-or-nothing" dilemma, which the trial court's ruling exacerbated. He claims the trial court abused its discretion. We disagree. The trial court did not abuse its discretion and any presumed error is harmless beyond a reasonable doubt.

1. The trial court did not abuse its discretion.

Appellant cites various opinions, including *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*),[16] for the proposition it is "common" for attorneys to argue about

---

16 In *Osband*, our Supreme Court declined to find prosecutorial misconduct when a prosecutor suggested during closing arguments that the defendant had committed rape, which had not been charged. The prosecutor made these comments when discussing the evidence supporting the actual crimes charged, which involved assault with intent to rape, attempted rape, and simple battery. (*Osband, supra,* 13 Cal.4th at p. 699.)

uncharged lesser offenses during closing arguments. He contends that, because the prosecutor in *Osband* discussed an uncharged crime, that right must also extend to the defense or, based on a lack of symmetry, a violation of federal due process would result.

None of appellant's cited authorities, however, including *Osband*, analyze whether a trial court abuses its discretion in limiting such argument.[17] Cases are not authority for propositions not considered or decided. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.) Appellant provides no authority establishing that the trial court abused its discretion in this situation.

Our independent research has not found any opinions holding that, as a matter of law, a trial court must give counsel an opportunity to discuss uncharged lesser related offenses during closing argument. We have also not found any authority holding that, as a matter of law, a court must allow defense counsel an opportunity to discuss the prosecution's charging discretion.

We cannot state that the trial court abused its discretion. During closing arguments, it appeared to the trial court that defense counsel was going to discuss uncharged lesser related offenses, including gross vehicular manslaughter. Prior to closing arguments, the defense had requested a jury instruction on gross vehicular manslaughter while intoxicated. This crime, however, is a lesser related charge to murder. (*People v. Hicks* (2017) 4 Cal.5th 203, 209.) It is undisputed that a criminal defendant has no right to seek jury instruction regarding lesser related offenses. (*People v. Kraft* (2000) 23 Cal.4th 978, 1064–1065.) As such, the trial court properly excluded it from the jury's consideration. During the sidebar, the court cautioned defense counsel

---

17 We do not dispute that both prosecutors and criminal defense attorneys have discussed uncharged lesser offenses during closing argument. The issue presented here, however, is whether the trial court abused its discretion in the unique circumstances of this case.

that he could not discuss those uncharged lesser related crimes. The court, however, did not further limit the defense's closing argument.

The court's ruling did not prevent appellant from presenting a defense or arguing how the jury should view the evidence relative to the charge at issue. Appellant's trial counsel contended that appellant did not commit murder because his intoxication was not a substantial factor in causing this accident. Defense counsel asserted that no evidence established that appellant "made any unsafe driving movements." Defense counsel maintained the evidence did not suggest that appellant fell asleep while driving. Instead, this accident was consistent with the passenger interfering with appellant's control of the vehicle. Defense counsel also argued the evidence did not establish beyond a reasonable doubt that appellant held a conscious disregard for human life when he drove that night. As such, implied malice was not established. Regardless of the court's ruling, the defense was able to argue why the jury should return a not guilty verdict. We cannot state that the court's ruling resulted in a manifest miscarriage of justice.

Based on this record, we will not disturb the trial court's decision on appeal. The court did not exercise its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. This ruling did not fall outside the bounds of reason under applicable law and relevant facts. Accordingly, an abuse of discretion is not present, and this claim fails. In any event, we also determine that any presumed error is harmless.

2. Any presumed error is harmless.

Appellant contends the trial court's ruling was prejudicial when reviewed under the federal standard of *Chapman, supra*, 386 U.S. at p. 24. He claims this was a close case and it is likely the jury chose to convict him of murder because they faced an "all-or-nothing dilemma" based on the single murder charge. We reject appellant's contentions that the trial court's ruling prejudiced him.

As discussed earlier in this opinion, the evidence of implied malice was overwhelming. This was not a close case. Based on appellant's high BAC percentage, his prior DUI convictions, his probationary status, and his attendance at educational programs highlighting the hazards of driving while intoxicated, the circumstantial evidence overwhelmingly demonstrated appellant's subjective awareness that driving under the influence of alcohol was dangerous to human life. The evidence overwhelmingly establishes that appellant again decided to drink and drive. It is beyond a reasonable doubt that the trial court's ruling, even if amounting to a federal violation, was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) The guilty verdict rendered in this trial was surely unattributable to this purported error. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Accordingly, even if the trial court abused its discretion, the alleged error was not prejudicial, and this claim fails.

VII. The Trial Court Did Not Err In Denying A Defense Request For A Clarifying Instruction On The Term "Conscious Disregard" For Human Life And Any Presumed Error Was Harmless.

Appellant argues the trial court committed prejudicial error when it denied a defense request for a clarifying instruction for the term "conscious disregard" for human life.[18]

A. Background.

Using CALCRIM No. 520, the trial court instructed the jury regarding the elements of murder, including the requirement of malice aforethought. The court explained that two types of malice aforethought exist, express and implied. According to the court, appellant "acted with implied malice if; one, he intentionally committed an act; two, the natural and probable consequences of the act were dangerous to human life; three, at the time he acted he knew his act was dangerous to human life; and four, he

---

18 The term " 'conscious disregard for life' " refers to the mental component of implied malice murder. (*People v. Bryant* (2013) 56 Cal.4th 959, 968.)

deliberately acted with conscious disregard for human life." The court explained that malice aforethought does not require hatred or ill-will toward the victim, and it does not require deliberation or the passage of any particular time period. The court also defined the term "natural and probable consequence" and explained that more than one cause of death may occur.

Prior to the trial court instructing the jury, appellant requested a special instruction that clarified the term "conscious disregard" for human life. Appellant's proposed instruction reads as follows:

> "A vehicular homicide committed while intoxicated involves implied malice and is second degree murder if a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life. The term 'conscious disregard for life,' as used in the instructions relating to implied malice, can be defined as, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.' "

The trial court denied appellant's request, reasoning that the concept was conveyed adequately in CALCRIM No. 520.

B. Standard of review.

Our Supreme Court has held that a trial court may, and must, refuse a jury instruction that incorrectly states the law or is argumentative, i.e., it invites the jury to draw inferences favorable to one party from specific items of evidence. A court may also refuse an instruction that is duplicative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.)

C. Analysis.

Appellant argues that his proposed instruction was not to replace the phrase "conscious disregard" in CALCRIM No. 520 but, instead, was "only to provide an additional, clarifying instruction." He contends that CALCRIM No. 520 should have been supplemented by language approved in various appellate opinions.[19] We disagree

---

[19] In addition to *Olivas*, appellant cites the following five opinions to support his contention that his proposed modifying language was appropriate: (1) *People v. McNally*

that the trial court erred. In any event, we also conclude that any presumed error was harmless.

1. The trial court did not err.

"When a jury is properly instructed as to an applicable legal principle it is unnecessary to restate that principle in another way." (*People v. Schmitt* (1957) 155 Cal.App.2d 87, 112.) A trial court does not err in refusing a duplicative proposed instruction, even though the instruction may be a correct statement of law. (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

The Supreme Court has upheld CALCRIM No. 520 as an accurate definition of implied malice. (*People v. Knoller* (2007) 41 Cal.4th 139, 152.) As stated by the Supreme Court, "Malice is implied when the killing is proximately caused by ' "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." ' [Citation.]" (*Id.* at p. 152.) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another . . . ." (*Id.* at p. 143.) The CALCRIM instructions are the officially endorsed jury instructions in California. (See *People v. Thomas* (2007) 150 Cal.App.4th 461, 465–466; see also Cal. Rules of Court, rule 2.1050(a).)

(2015) 236 Cal.App.4th 1419; (2) *People v. Jimenez* (2015) 242 Cal.App.4th 1337; (3) *People v. Johnigan* (2011) 196 Cal.App.4th 1084; (4) *People v. Murray, supra,* 225 Cal.App.3d 734; and (5) *People v. Brogna, supra,* 202 Cal.App.3d 700. These opinions, however, do not hold that the language used in *Olivas* should be given to a jury or used to modify CALCRIM No. 520. To the contrary, these opinions used *Olivas*'s definition when looking for substantial evidence to support convictions of second degree murder in cases involving implied malice. (*People v. McNally, supra,* 236 Cal.App.4th at pp. 1422, 1426; *People v. Jimenez, supra,* 242 Cal.App.4th at p. 1358; *People v. Johnigan, supra,* 196 Cal.App.4th at p. 1092; *People v. Murray, supra,* 225 Cal.App.3d at p. 746; *People v. Brogna, supra,* 202 Cal.App.3d at p. 708.) These opinions do not establish error in this matter.

Appellant's proposed special instruction is based on similar language found in *Olivas, supra*, 172 Cal.App.3d 984. In *Olivas*, the appellate court used "everyday language" to describe what it meant for a defendant to exhibit a "conscious disregard for life" in a case involving vehicular homicide and intoxication. According to *Olivas*, the definition of a conscious disregard for life is: " 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.' " (*Id.* at pp. 987–988.) *Olivas*, however, did not hold or suggest that this definition should replace or even modify CALCRIM No. 520. Instead, this definition was used as part of the appellate court's analysis whether sufficient evidence supported a conviction of second degree murder. (*Olivas, supra*, 172 Cal.App.3d at p. 986.)

In this matter, CALCRIM No. 520 adequately explained implied malice, and it followed the Supreme Court's definition of that concept. The language appearing in CALCRIM No. 520 is not confusing. The trial court properly instructed the jury regarding this concept and it was unnecessary to restate that principle in another way. (See *People v. Schmitt*, *supra*, 155 Cal.App.2d at p. 112.) As such, the trial court did not err in refusing appellant's proposed instruction, which was duplicative to the language appearing in CALCRIM No. 520. (See *People v. Moon, supra*, 37 Cal.4th at p. 30.) In any event, we determine that any presumed error was harmless.

2. Any presumed error was harmless.

Errors in jury instructions are typically reviewed under the state standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. We ask whether it is reasonably probable the defendant would have received a more favorable result in the absence of the error. (*People v. Partida*, *supra*, 37 Cal.4th at p. 439.) Based on this record, however, we can declare that any presumed instructional error was harmless even under the more stringent *Chapman* standard.

Appellant's argument is speculative that the jury may have been confused about the concept of implied malice. Regardless, as discussed earlier in this opinion,

overwhelming evidence established appellant's implied malice. Even if the jury had received appellant's proposed instruction, the guilty verdict rendered in this trial was surely unattributable to this purported error. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) It is beyond a reasonable doubt that the alleged error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) Accordingly, prejudice is not present, and this claim fails.

VIII. Appellant Did Not Suffer Cumulative Prejudice.

Appellant alleges he suffered a due process violation from "cumulative prejudice" stemming from the errors discussed above. This assertion is without merit because we have rejected all appellate claims. Accordingly, reversal is not warranted. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057 [the defendant's cumulative prejudice argument rejected based on findings each individual contention lacked merit or did not result in prejudice].)

IX. We Will Order The Trial Court To Correct A Clerical Oversight In The Abstract Of Judgment.

Appellant's abstract of judgment states "murder" for his conviction. The parties agree, as do we, that the abstract should be amended to reflect a conviction of second degree murder. Although the verdict form was silent regarding the degree of murder, the trial court only instructed the jury on second degree murder. The prosecutor argued that appellant committed second degree murder. At sentencing, the trial court did not declare what degree of murder occurred, but it sentenced appellant to prison for 15 years to life, which is consistent with the penalty imposed for second degree murder under section 190, subdivision (a).

Accordingly, we will direct the trial court to amend the abstract of judgment to reflect a conviction of second degree murder. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [an appellate court may correct errors and omissions appearing in abstracts of judgment].)

DISPOSITION

We direct the trial court to amend the abstract of judgment to reflect conviction of "second degree murder" in count 1. The court shall forward a certified copy of the amended abstract to the appropriate authorities. The judgment is otherwise affirmed.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
POOCHIGIAN, J.

_____
FRANSON, J.